

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RAMIRO GOMEZ,

Petitioner,

vs.

A. P. KANE, Warden,

Respondent.

No. C 05-1700 JSW (PR)

**ORDER DENYING PETITION FOR  
WRIT OF HABEAS CORPUS**

**INTRODUCTION**

Petitioner, a prisoner of the State of California, currently incarcerated at the Correctional Training Facility in Soledad, California, filed a habeas corpus petition pursuant to 28 U.S.C. § 2254 challenging the Board of Prison Terms' ("BPT") denial of parole during parole suitability proceedings in 2004. This Court ordered Respondent to show cause why a writ should not issue. After this Court denied Respondent's motion to dismiss the petition, Respondent filed an answer, memorandum and exhibits in support thereof and Petitioner has filed a traverse. This *pro se* habeas petition is now before the Court for consideration of the merits. For the reasons stated below, the petition is denied on the merits.

**BACKGROUND**

Petitioner was convicted of second degree murder in Alameda County Superior Court in 1988 and was sentenced to a term of fifteen years-to-life in state prison. Petitioner's minimum parole eligibility date was November 14, 1996. In this habeas action, Petitioner does not challenge his conviction, but instead alleges that his due

1 process rights were violated by the denial of parole, for one year, at his third parole  
2 suitability hearing on May 26, 2004.

3 At the May 26, 2004 hearing, Petitioner appeared with counsel before a BPT panel.  
4 The panel's decision upon the Statement of Facts in the BPT's July, 2001 report regarding  
5 Petitioner's commitment offense. The Court includes that summary here:

6 On 10-25-86, detectives were notified by Lieutenant Wallster, Hollanbach  
7 AM Watch Commander, of the murder of victim Johnny Flores. Detectives  
8 arrived at the scene, Avenue 43 and Bernice, at 0225 hours. The victim,  
9 Johnny Flores, had been confronted by unknown suspects as he was seated  
10 in his vehicle. The suspects shot the victim in the head with a shotgun. The  
11 investigation revealed the victim was an associate of the "Ave 43" gang  
12 which has had an ongoing battle with the "Dogtown" gang.

13 Suspect Gomez was arrested for PC 187(A) and advised of his rights. Gomez  
14 waived his rights and stated, "three or four days before the death of the guy  
15 from the Avenues, my friend loaned me a dent puller. It is used to pull the  
16 ignition switch out of cars. On 10-25-86, around 9 or 10 PM, me and Clavito  
17 (Ismael Solis) were down in the Hole (Ave 50 and Pasadena Freeway). We  
18 were kicking back drinking beer and talking to the guys. Me and Ismael  
19 talked about getting a car. I got in the car and Clavito was still standing  
20 outside. I then hit the guy in the face with the dent puller. The guy went  
21 back [sic] then opened the door and got out. Clavito got in behind the wheel  
22 and we went cruising around Highland Park. While we were cruising around,  
23 Clavito said, "Let's go to Chuco's (Juan Moreno) to get the shot gun." I said,  
24 "okay."

25 We drove to Chuco's. We talked about going to shoot someone from the  
26 Avenues on the way over to Chuco's. We went upstairs to Chuco's bedroom  
27 and asked him if we could borrow the shotgun. Chuco said, "okay" and  
28 Clavito got it out from under the bed. We didn't stay very long at Chuco's.  
We left there and went cruising around Cypress Park and around Ave 43.  
Clavito was driving and stopped on Avenue 43 a couple of blocks from a  
school. I then saw a red Monte Carlo pull up along side of me and stop.  
There was one guy in the car and he looked at me and said, "What are you  
looking at." He then said, "Avenues," I said, "Dogtown." The guy then went  
down on his right side like he was going to get something. When he came  
back up, I grabbed the shotgun which was on the floorboard of the car. As he  
turned around to open the door of his car, I shot him three times. I think I hit  
him the first time because he went down after the first shot. We left there and  
drove to the Hole. We drank some beer and stayed there for about one hour.  
Then we drove to Chuco's house and I gave him back the shotgun. Clavito  
told Chuco that I had shot a dude from the Avenues. We left Chuco's and  
drove the car a couple of blocks from Chuco's house . . . For the preparation  
of the P.O.R., the probation officer contacted LAPD investigator who  
characterized Gomez as being a vicious, cold-blooded murderer. He related  
that Gomez "copped out" and was apparently proud of it. The officer  
reported that while Gomez was being fingerprinted, he asked if he had done a

1 good job and wanted to see pictures of the victim. The officer theorized that  
2 Gomez and his crime partner, (Ismael Solis) were trying to impress the other  
members of the Dogtown gang and to improve their standing in the gang.<sup>1</sup>

3 (See Resp. Ex. 3 (Life Prisoner Evaluation Report) at 1-2; Ex. 4 (Probation Officer's  
4 Report); Ex. 7 (Police Report).)

5 The BPT found that Petitioner was not suitable for parole and would pose an  
6 unreasonable risk of danger to society or a threat to public safety. The presiding  
7 Commissioner explained that, in deciding to deny parole, the panel considered Petitioner's  
8 social history, including his dysfunctional family life, educational background, alcohol  
9 and drug use, gang involvement, and his juvenile records; his in-prison programming,  
10 including his work, vocation, education, participation in self-help groups, and minimal  
11 disciplinary history; his counselor and the prison psychologists assessments of his  
12 potential for dangerousness; and his parole plans. (See Answer at 3, Ex. 2 at 15-44.)

13 Petitioner challenged the BPT's May 26, 2004 decision in the state superior,  
14 appellate and supreme courts. The California Court of Appeal for the Fourth Appellate  
15 District issued the last reasoned opinion denying Petitioner's claims. After the Supreme  
16 Court of California summarily denied his final state habeas petition on December 17,  
17 2005, Petitioner filed the instant federal petition for a writ of habeas corpus. The parties  
18 do not dispute that state judicial remedies were exhausted for the claims asserted in this  
19 petition.

## 20 DISCUSSION

### 21 A. Standard of Review

22 The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified  
23 under 28 U.S.C. § 2254, provides "the exclusive vehicle for a habeas petition by a state  
24 prisoner in custody pursuant to a state court judgment, even when the petitioner is not  
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26 <sup>1</sup>Petitioner testified at his 2004 parole hearing that he did not shoot the victim in self-defense.  
27 (See Resp. Ex. 2 at 56.) At the conclusion of the hearing, Petitioner also testified that he was not  
28 expecting a parole date any time soon. (*Id.* at 58.)

1 challenging his underlying state court conviction.” *White v. Lambert*, 370 F.3d 1002,  
2 1009-10 (9th Cir. 2004). Under AEDPA, this court may entertain a petition for habeas  
3 relief on behalf of a California state inmate “only on the ground that he is in custody in  
4 violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. §  
5 2254(a).

6 The writ may not be granted unless the state court’s adjudication of any claim on  
7 the merits: “(1) resulted in a decision that was contrary to, or involved an unreasonable  
8 application of, clearly established Federal law, as determined by the Supreme Court of the  
9 United States; or (2) resulted in a decision that was based on an unreasonable  
10 determination of the facts in light of the evidence presented in the State court proceeding.”  
11 *Id.* at § 2254(d). Under this deferential standard, federal habeas relief will not be granted  
12 “simply because [this] court concludes in its independent judgment that the relevant state-  
13 court decision applied clearly established federal law erroneously or incorrectly. Rather,  
14 that application must also be unreasonable.” *Williams v. Taylor*, 529 U.S. 362, 411  
15 (2000).

16 While circuit law may provide persuasive authority in determining whether the  
17 state court made an unreasonable application of Supreme Court precedent, the only  
18 definitive source of clearly established federal law under 28 U.S.C. § 2254(d) is in the  
19 holdings (as opposed to the dicta) of the Supreme Court as of the time of the state court  
20 decision. *Id.* at 412; *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003).

21 B. Legal Claims and Analysis

22 Petitioner seeks federal habeas corpus relief from the BPT’s May 26, 2004 decision  
23 finding him not suitable for parole, and denying him a subsequent hearing for one year, on  
24 the ground that the decision does not comport with due process. Petitioner claims that the  
25 BPT’s decision is not supported by some evidence in the record having an “indicia of  
26 reliability” that Petitioner is currently a threat or unreasonable risk to society. *See* Petition  
27 at 7. Petitioner also claims that the BPT possesses an “Anti-Parole Policy” which is  
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1 systemically biased, in violation of his constitutional rights.

2 California's parole scheme provides that the Board "shall set a release date unless  
3 it determines that the gravity of the current convicted offense or offenses, or the timing  
4 and gravity of current or past convicted offense or offenses, is such that consideration of  
5 the public safety requires a more lengthy period of incarceration for this individual, and  
6 that a parole date, therefore, cannot be fixed at this meeting." Cal. Penal Code § 3041(b).  
7 In making this determination, the board considers various factors, including the prisoner's  
8 social history, past criminal history, and base and other commitment offenses, including  
9 behavior before, during and after the crime. *See* Cal. Code Regs. tit. 15, § 2402(b) – (d).

10 California's parole scheme "gives rise to a cognizable liberty interest in release on  
11 parole" which cannot be denied without adequate procedural due process protections.  
12 *Sass v. California Bd. of Prison Terms*, 461 F.3d 1123, 1128 (9th Cir. 2006); *McQuillion*  
13 *v. Duncan*, 306 F.3d 895, 902 (9th Cir. 2002). The determination does not depend on  
14 whether a parole release date has ever been set for the inmate because "[t]he liberty  
15 interest is created, not upon the grant of a parole date, but upon the incarceration of the  
16 inmate." *Biggs v. Terhune*, 334 F.3d 910, 914-15 (9th Cir. 2003).

17 Petitioner's due process rights require that "some evidence" support the parole  
18 board's decision finding him unsuitable for parole. *Sass*, 461 F.3d at 1125 (holding that  
19 the "some evidence" standard for disciplinary hearings outlined in *Superintendent v. Hill*,  
20 472 U.S. 445, 454-55 (1985), applies to parole decisions in § 2254 habeas petition);  
21 *Biggs*, 334 F.3d at 915 (same); *McQuillion*, 306 F.2d at 904 (same). The Ninth Circuit  
22 has recently clarified that "California courts have made clear that the "findings that are  
23 necessary to deem a prisoner unsuitable for parole are not that a particular factor or factors  
24 indicating unsuitability exist, but that a prisoner's release will unreasonably endanger  
25 public safety." *Hayward v. Marshall*, 512 F.3d 536, 543 (9th Cir. 2008) (citations  
26 omitted) (quoting *Irons v. Carey*, 505 F.3d 846, 850 (9th Cir. 2007)). The relevant  
27 criteria under which the BPT ordinarily determines whether a prisoner is too dangerous to  
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1 be found suitable for parole are set forth in the California Code of Regulations at Cal.  
2 Code Regs. tit. 15, § 2402. *Id.* This Court must therefore determine whether the state  
3 court decision finding the BPT's decision was supported by "some evidence the parolee's  
4 release unreasonably endangers public safety." *Id.* (citation omitted.)

5 The "some evidence" standard is minimally stringent and ensures that "the record  
6 is not so devoid of evidence that the findings of [the BPT] were without support or  
7 otherwise arbitrary." *Hill*, 472 U.S. at 457. Determining whether this requirement is  
8 satisfied "does not require examination of the entire record, independent assessment of the  
9 credibility of witnesses, or weighing of the evidence." *Id.* at 455-56 (quoted in *Sass*, 461  
10 F.3d at 1128).

11 Due process also requires that the evidence underlying the parole board's decision  
12 have some indicia of reliability. *Biggs*, 334 F.3d at 915; *McQuillion*, 306 F.3d at 904.  
13 Relevant in this inquiry "is whether the prisoner was afforded an opportunity to appear  
14 before, and present evidence to, the board." *Morales v. California Dep't of Corrections*,  
15 16 F.3d 1001, 1005 (9th Cir. 1994), *rev'd on other grounds*, 514 U.S. 499 (1995). In sum,  
16 if the parole board's determination of parole unsuitability is to satisfy due process, there  
17 must be some evidence, with some indicia of reliability, to support the decision. *Rosas v.*  
18 *Nielsen*, 428 F.3d 1229, 1232 (9th Cir. 2005).

19 The record shows that the BPT panel afforded Petitioner and his counsel an  
20 opportunity to speak and present their case at the hearing, gave them time to review  
21 Petitioner's central file, allowed them to present relevant documents and provided them  
22 with a reasoned decision in denying parole. The panel concluded that Petitioner "is not  
23 suitable for parole and would pose an unreasonable risk of danger to society or a threat to  
24 public safety if released from prison." (Resp. Ex. 2 at 59: 9-12.) The panel explained  
25 that it found that the offense involved "the offense was carried out in a dispassionate  
26 manner, and the offense was carried out in a manner that demonstrates a callous disregard  
27 for human life." (*Id.* at 59:14-17.) The panel further described the crime as "horrendous  
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1 and needless, someone was killed for no apparent reason.” (*Id.* at 60: 12-14.) The panel  
2 also found that Petitioner “has a history of unstable and tumultuous relationships with  
3 others. He has an escalating pattern of criminal conduct. He has failed previous grants of  
4 probation and cannot be counted upon to avoid criminality.” (*Id.* at 60:14-19.) The panel  
5 also commented on Petitioner’s prior juvenile criminality which includes, “joining a  
6 juvenile gang at age 13, abusing alcohol and drugs, [and] participating in gang activities.”  
7 (*Id.* at 60:20-22.) Additionally, the panel further found that Petitioner “has a criminal  
8 arrest history, a couple of burglaries, drunk, in possession of marijuana.” (*Id.* at 60:22-  
9 24.)

10 The panel also found that “the psychological evaluation performed 5-23-01 by M.  
11 Carswell, a clinical psychologist, is not totally supportive of release.” (*Id.* at 60:24-27 and  
12 61: 1-2.) On page 5 of the psychologist’s report it states, “if released to the community  
13 [Petitioner’s] violence potential is estimated to be slightly above the average citizen in the  
14 community only because statistically someone who has been violent in the past could be  
15 considered at risk for violence again.” (*Id.* at 61:3-10.)

16 The panel further found that Petitioner needed to firm up his parole plans. (*Id.* at  
17 61:11-12.) The letters provided by Petitioner, some of which were in Spanish needed to  
18 provide more detail. (*Id.* at 61: 12-14.) “The Hearing Panel [made] the following  
19 findings: The prisoner needs to continue to participate in self-help, to face, discuss,  
20 understand, and cope with stress in a nondestructive manner. Until progress is made, the  
21 prisoner continues to be unpredictable and a threat to others.” (*Id.* at 61: 19-25.)

22 The panel commended Petitioner for all of the positive things he has done while in  
23 prison, for receiving no 115s while in CDC, (*Id.* at 61: 26), and for receiving vocational  
24 certificates in masonry, mill and cabinet, as a general office clerk, vocational cleaning,  
25 drywall, and culinary, self-help participation, AA and NA for 15 years. (*Id.* at 62:1-5.)  
26 Additionally, the panel noted Petitioner’s participation in programs such as the IMPACT  
27 program, Gang Awareness, Breaking Barriers, ACTS, two Parenting classes and a disease  
28



1 prevention course. (*Id.* at 62:6-10.) The panel also noted that Petitioner is currently  
2 working in the dinning hall. (*Id.* at 62:10-12.)

3 The panel found, however, that “these positive aspects of his behavior, do not  
4 outweigh his factors for unsuitability.”(*Id.* at 62:13-14.) The panel recommended that  
5 Petitioner “remain disciplinary-free, continue to participate in any self-help that is  
6 available and cooperate with clinicians in the completion of a clinical evaluation before  
7 the next hearing in one year.” ( *Id.* at 62:16-20.)

8 The state superior court reviewed and considered the decision of the BPT and  
9 found that “the circumstances of Petitioner’s commitment offense were enough to  
10 establish more than the minimum necessary to sustain a conviction for second degree-  
11 murder . . . The superior court also found some evidence to support the denial of parole  
12 based on Petitioner’s unstable social history and his escalating pattern of criminal  
13 conduct.” (Resp. Ex. 8 at 2.) After finding that there was some evidence to support the  
14 Board’s decision, the California Court of Appeal denied Petitioner’s habeas petition.  
15 (Resp. Ex. 9.) The California Supreme summarily denied Petitioner’s petition for review.

16 The state court’s rejection of Petitioner's due process claim was not contrary to, or  
17 an unreasonable application of, the *Hill* standard, nor was it based on an unreasonable  
18 determination of the facts. *See* 28 U.S.C. § 2254(d). The BPT’s decision to deny  
19 Petitioner parole is supported by some evidence in the record and that evidence bears  
20 some indicia of reliability. *See, e.g., Rosas*, 428 F.3d at 1232-33 (upholding denial of  
21 parole based on gravity of offense and psychiatric reports); *Biggs*, 334 F.3d at 916  
22 (upholding denial of parole based solely on gravity of offense and conduct prior to  
23 imprisonment); *Morales*, 16 F.3d at 1005 (upholding denial of parole based on criminal  
24 history, cruel nature of offense, and need for further psychiatric treatment). The inquiry  
25 under *Hill* is simply “whether there is *any* evidence in the record that could support the  
26 conclusion reached by the [BPT].” *Hill*, 474 U.S. at 455-56 (emphasis added).

27 In this case, there is evidence that the “commitment offense was carried out in an  
28



1 especially violent and cruel manner, and in a dispassionate manner that demonstrates a  
2 callous disregard for human life.” (*See* Resp. Ex. 2 at 59.) Petitioner and his crime  
3 partner first car-jacked a car by hitting the owner in the face with a dent puller. (*Id.*)  
4 Then they decided that they needed a shotgun to look for a rival gang member to kill.  
5 (*Id.*) They obtained a shotgun from a friend, pulled up alongside a stranger, and Petitioner  
6 shot him three times based on Petitioner’s belief that he was a member of the “Avenues”  
7 gang. (*Id.* at 59-60.) In addition, the motive for the offense -- advancement in his gang --  
8 was extremely trivial in relationship to the gravity of shooting and killing a complete  
9 stranger.

10 There is also some evidence that Petitioner had an unstable social history and prior  
11 criminality. *Cf.* Cal. Code Regs. tit. 15, § 2402(c) & (d) (listing circumstances tending to  
12 show unsuitability for parole and circumstances tending to show suitability). As noted by  
13 the panel, Petitioner “has an escalating pattern of criminal conduct,” including prior  
14 arrests for drug possession and burglary. Petitioner also has a history of alcohol and drug  
15 abuse, as well as a “history of unstable and tumultuous relationships with others,”  
16 including physically abusing his girlfriend. (*Id.* at 60:15-16, 20-21; Ex. 4 at 7)

17 The foregoing evidence of the way Petitioner carried out the murder, the trivial  
18 motive for it, and Petitioner’s past criminal conduct amounts to “some evidence” that he  
19 would pose a threat to society if released. Additionally, the evidence that Petitioner did  
20 not have definitive parole plans, and the psychologist’s opinion that Petitioner has a  
21 slightly above average potential to pose a threat to society, also reasonably indicates that  
22 Petitioner posed an increased risk of danger if he was released. Therefore, the state  
23 courts’ determination that there was some evidence to support the BPT’s decision is not  
24 contrary to or an unreasonable application of consistent with established Supreme Court  
25 precedent.

26 The Ninth Circuit has noted that continued reliance on the unchanging factors of  
27 Petitioner’s commitment offense and prior history will “at some point violate due  
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1 process” unless the unchanging circumstances reliably establish that Petitioner presents  
2 an unreasonably public safety risk. *See Hayward*, 512 F.3d at 545 (citing *Irons*, 505 F.3d  
3 at 854). The Ninth Circuit has also stated, however, that “[u]nder AEDPA it is not our  
4 function to speculate about how future parole hearings could proceed.” *Sass*, 461 F.3d at  
5 1129. In any event, the concern raised in *Hayward* is not yet present in this case because  
6 Petitioner had not only served 16 years of his sentence of 15 years to life. *Cf., e.g.,*  
7 *Irons*, 479 F.3d at 661 (upholding reliance upon commitment offense to deny parole at  
8 fifth parole hearing after petitioner had served 16 years in prison, which was less than the  
9 minimum term); *Sass*, 461 F.3d at 1129 (same, for second and third parole hearings after  
10 petitioner had served 11 and 12 years in prison). Moreover, as discussed above, the  
11 challenged parole denial here was based on other evidence in addition to the commitment  
12 offense and criminal history. Therefore, the instant case does not implicate the concerns raised  
13 in *Hayward* and *Biggs*.

14 Petitioner further argues that the BPT possesses an “anti-parole policy” that is  
15 biased and violates his constitutional rights. Petitioner has set forth no evidentiary  
16 support for his bias claim. But even if he had, there is no evidence in the record  
17 indicating that this alleged bias affected the BPT’s decision or served as the basis for  
18 denying Petitioner parole. To the contrary, the transcript from Petitioner’s parole hearing  
19 demonstrates that he received an individualized assessment of his potential parole  
20 suitability. Petitioner’s reliance on the high percentage of parole denials for life inmates  
21 provides no proof of the BPT’s alleged bias against parole. *Cf. California Dept. of*  
22 *Corrections v. Morales*, 514 U.S. 499, 510-11 (1995) (citing that 90 percent of all  
23 California inmates are found unsuitable for parole as evidence that deferring annual  
24 parole suitability hearings was lawful and reasonable). The state courts’ rejection of  
25 Petitioner’s claims cannot be said to be objectively unreasonable. *See* 28 U.S.C. §  
26 2254(d); *Williams*, 529 U.S. at 409.

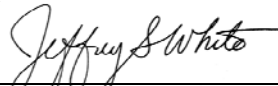
27 Accordingly, Petitioner is not entitled to habeas relief.  
28

**CONCLUSION**

For the reasons set forth above, the petition for a writ of habeas corpus is  
DENIED. The Clerk shall enter judgment in favor of Respondent and close the file.

IT IS SO ORDERED.

DATED: April 17, 2008

  
\_\_\_\_\_  
JEFFREY S. WHITE  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

GOMEZ,

Plaintiff,

v.

Case Number: CV05-01700 JSW

**CERTIFICATE OF SERVICE**

1 KANE et al,

2 Defendant.


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3  
4 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

5 That on April 17, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said  
6 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing  
7 said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery  
8 receptacle located in the Clerk's office.

9 Ramiro Gomez  
10 Correctional Training Facility  
11 P.O. Box 689  
D87189  
Soledad, CA 93960-0689

12 Dated: April 17, 2008

  
Richard W. Wieking, Clerk  
By: Jennifer Ottolini, Deputy Clerk